No. 87-1151

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LEDERLE LABORATORIES, a division of American Cyanamid Company,

Petitioner,

vs.

DAVID TONER, Guardian ad Litem for KEVIN TONER, an infant child, and DAVID TONER and SUSAN TONER, husband and wife, individually,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this case presents any basis for review by Writ of Certiorari.

Whether the court of appeals erred in applying a standard which held the special verdicts consistent if possible under any fair reading of the verdicts considered in light of the judge's instructions to the jury.

Whether the meaning, and therefore the consistency, of special verdicts in a diversity product liability case is controlled by the reviewing court's interpretation of the state's substantive law governing product liability.

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STATEMENT OF THE CASE

Petitioner's statement of the case and first argument for granting the writ attempt to advance the Petition by placing this case in a false context. Respondents accordingly submit the following information related to the context of the Petition.

This case was tried to a jury in 1984 in Boise, Idaho. The jury concluded that Lederle Laboratories was negligent in connection with the manufacture and distribution of its DTP vaccine, Tri-Immunol, and that Lederle's negligence was a proximate cause of Kevin Toner's paralysis. Kevin Toner has been paralyzed from the waist down since 1979 when, at the age of two months, he received his first DTP vaccination. The jury's negligence verdict was reached on substantial evidence that Lederle could have marketed a safer vaccine which would have prevented Kevin Toner's injuries. Two other juries have held another manufacturer of DTP vaccines liable for injuries to children under similar circumstances. *Graham v. Wyeth Laboratories*, No. 85-1481-K (D.Kan. Oct. 15, 1987); *White v. Wyeth Laboratories*, No. 071,220 (Ohio Common Pleas Cuyahoga County, March 18, 1986).

Petitioner's DTP vaccine, Tri-Immunol, is a whole-cell vaccine, and therefore includes all the neurotoxic elements of the Pertussis bacteria. The evidence concerning the availability of a safer vaccine included: testimony concerning Tri-Solgen, a fractionated vaccine manufactured by Eli Lilly Company in the mid-1960's through mid-1970's which occupied a substantial portion of the DTP vaccine market during that period of time (in a fractionated vaccine the pertussis bacteria is broken up and toxic elements of the bac-

teria separated and removed from the vaccine); testimony concerning Lederle's research into fractionated vaccine; and Lederle's own assessment of the superior safety of fractionated cell vaccines and their economic feasibility. Much of this evidence came from Lederle's own internal memoranda and correspondence.

In addition to its determination of the negligence of Lederle, the jury found that Tri-Immunol was not "in a defective condition unreasonably dangerous to persons" and that Lederle did not breach an implied warranty of merchantability.

Lederle's appeal raised unsettled questions of Idaho substantive law as to product liability. The court of appeals certified these questions to the Idaho Supreme Court. *Toner v. Lederle Laboratories*, 779 F2d 1429 (9th Cir. 1986). The Idaho Supreme Court's response to the certified questions, *Toner v. Lederle Laboratories*, 112 Idaho 328, 732 P2d 297 (1987), included a discussion of the distinction between negligence and strict liability in Idaho substantive law. The Idaho Supreme Court explained that Idaho substantive law requires the jury to focus on the conduct of the defendant when determining liability for negligence, and on the product, and consumer expectations, when determining liability for strict liability. 112 Idaho at 334, n.5, 732 P2d at 303, n.5.

The court of appeals applied the fair reading of the verdict provided by the jury instructions, and required by the Idaho Supreme Court's decision clarifying Idaho substantive law, 112 Idaho at 332-334, 732 P2d at 302-303, in determining the consistency of the verdict. The court of appeals applied the required focus and recognized that under Idaho substantive law the

verdict was consistent. *Toner v. Lederle Laboratories*, 828 F2d 510, 512-514 (1987).

The court of appeals and district court have rejected Petitioner's argument that the jury's verdict was the product of an emotional desire to compensate a young child rather than a reasoned response to the evidence. Lederle's Petition does not challenge the sufficiency of the evidence. Petitioner's indirect attack on the jury in its first argument for granting the writ is without foundation and inappropriate.

Petitioner's attempt to characterize the jury's verdict as a threat to national health policy is also erroneous and inappropriate. The questions of national health policy raised by DTP litigation have been addressed by Congress in the National Childhood Vaccine Injury Act of 1986, 42 USC §300aa, et seq., modified and funded by the recently-passed Vaccine Compensation Amendments of the Omnibus Budget Reconciliation Act of 1987, Public Law No. 100-203, §§ 4301-4307, 9201-9202 (1987). The Childhood Vaccine Injury Act has no effect on this case.

Petitioner's first argument for granting the writ also misinterprets the court of appeals opinion and misconstrues the special verdicts.

Petitioner argues that Judge Anthony Kennedy of the court of appeals "applied a standard that seems to call for reconciliation [of the special verdicts] whenever a theoretical framework for reconciliation is 'not beyond peradventure'." Petition, p. 12. No fair reading of the court of appeals opinion supports that suggestion. As discussed *infra* at 7-10, the court of appeals applied the "fair reading of the verdicts" standard throughout its opinion. Petitioner's argu-

ment is based on two words taken out of context from a single paragraph in the court of appeals opinion. The remainder of the paragraph, quoted at 9-10, *infra*, demonstrates that the court adhered to the fair reading of the verdict standard.

Petitioner's erroneous reading of the special verdicts also relies on a few words taken out of context from the relevant jury instructions. The special verdicts read as follows:

> "*QUESTION NO. 1: Have the plaintiffs proved by a preponderance of the evidence, that Kevin Toner's paralysis was proximately caused by the DPT vaccine manufactured and sold by the defendant Lederle Laboratories?*
>
> "*ANSWER: Yes.*
>
> "*QUESTION NO. 2: Was defendant Lederle Laboratories negligent in connection with the product Tri-Immunol which was the proximate cause of the plaintiff's injuries?*
>
> "*ANSWER: Yes.*
>
> "*QUESTION NO. 3: Was the product Tri-Immunol manufactured by the defendant Lederle Laboratories in a defective condition unreasonably dangerous to persons which was the proximate cause of the plaintiff's injuries?*
>
> "*ANSWER: No.*
>
> "*QUESTION NO. 4: Did defendant Lederle Laboratories breach an implied warranty of merchantability in connection with the product Tri-Immunol which was the proximate cause of the plaintiff's injury?*

"ANSWER: No.

"QUESTION NO. 5: What is the total amount of damages sustained by the plaintiffs as a result of the injuries to Kevin Toner?

"ANSWER: $1,131,200."

The jury instructions applicable to each of the special verdicts define distinct standards of liability. As explained by the court of appeals, and discussed *infra* at 9-10, under Idaho law and the jury instructions the special verdicts are consistent.

REASONS FOR DENYING THE WRIT

Lederle Laboratories' Petition should be denied because there is no conflict among the circuits as to the legal standards applied in determining the consistency of special verdicts in product liability cases.

All circuits which have addressed the issue have recognized a duty to find the verdicts consistent if possible under a fair reading of the verdicts, *Toner v. Lederle Laboratories*, 828 F2d 510, 512 (9th Cir. 1987); *Witt v. Norfe, Inc.*, 725 F2d 1277, 1278 (11th Cir. 1984); *McIntyre v. Everest & Jennings, Inc.*, 575 F2d 155, 157 (8th Cir. 1977); *cert. denied*,439 U.S. 864 (1978), and have examined the jury instructions and applicable state substantive laws to determine whether the verdicts can be fairly read as consistent, *Toner*, 828 F2d at 512-14; *Witt*, 725 F2d at 1278-1280; *McIntyre*, 575 F2d at 157-158).

Lederle predicates its Petition on a conflict which does not exist. Lederle relies on two cases which it suggests reflect the conflict. The primary case on which Lederle relies, *Witt v. Norfe, Inc.*, 725 F2d

1277 (1984), actually recognizes that the challenged verdicts could be consistent under different state substantive law. *Witt*, 725 F2d at 1279. The second case on which Lederle relies, *McIntyre v. Everest & Jennings, Inc.*,575 F2d 155 (8th Cir. 1977), *cert. denied*, 439 U.S. 864 (1978), expressly refused to rule on the consistency of the challenged verdicts because the state substantive law on the issue was unclear and because resolution of the issue was unnecessary to its decision. *McIntyre*, 575 F2d at 158.

Lederle relies on an illusion of conflict. The Petition should be denied as there is no conflict.

Lederle's Petition should also be denied because it would require the Court to review Idaho substantive law. The true issue involved, the consistency of the jury's special verdicts, is controlled by Idaho products liability law. The court of appeals ruled that the special verdicts were consistent under the reading of the verdicts provided by Idaho law and the jury instructions which distinguished negligence, strict liability, and implied warranty. *Toner*, 828 F2d at 513-14. Review by certiorari would necessarily involve this Court in a review of the court of appeals' application of Idaho substantive law. The Petition should be denied.

I.

THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS ON THE ISSUES INVOLVED IN THE PETITION.

Lederle requests this Court to review the consistency of the jury's special verdicts in a product liability case. The special verdicts held that Lederle was negligent with regard to its DTP vaccine, Tri-Immunol;

that Tri-Immunol was not sold in a defective condition, unreasonably dangerous to persons; and that Lederle's sale of Tri-Immunol did not breach the implied warranty of merchantability (that Tri-Immunol was not unfit for its ordinary use).

The Ninth Circuit Court of Appeals, Kennedy, J., held, after a careful review of the trial court's instructions and the Idaho Supreme Court's response to certified questions concerning the applicable Idaho law, that the verdicts were consistent.

The court of appeals' opinion succinctly explains the standard it applied in determining the consistency of the special verdicts.

> "We turn to the issue of whether the jury's special verdicts are fatally inconsistent. We are bound to find the special verdicts consistent if we can do so under a fair reading of them. Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108, 119 (1963); Atlantic & Gulf Stevedores, Inc. vs. Ellerman Lines Ltd., 369 U.S. 355, 364 (1962); Blanton v. Mobil Oil Corp., 721 F.2d 1207, 1213 (9th Cir. 1983), cert. denied, 471 U.S. 1007 (1985). When faced with a claim that verdicts are inconsistent, the court must search for a reasonable way to read the verdicts as expressing a coherent view of the case, and must exhaust this effort before it is free to disregard the jury's verdict and remand the case for a new trial. Gallick, 372 U.S. at 119. The consistency of the jury verdicts must be considered in light of the judge's instructions to the jury. Id. at 120-21; Bates v. Jean, 745 F.2d 1146, 1151(7th Cir. 1984)."

Toner, 828 F2d at 512. This standard is applied in an opinion which considers the evidence presented the jury and the Idaho law expressed in the jury instructions.

The court reconciled the verdicts on negligence and strict liability on the basis of the different focus in the two theories under Idaho law.

> "In light of the Idaho Supreme Court's opinion and the instructions actually given to the jury, we think Lederle's paradox can be resolved and the jury's verdicts reconciled. As the Idaho Supreme Court points out, the focus in negligence is on the manufacturer's conduct, while in strict liability it is on the product and the user's expectations. Id. [*Toner v. Lederle*, 112 Idaho 328, 334, 732 P2d 297 (Idaho 1987)] at 303 n.5; Rojas v. Lindsay Mfg. Co., 108 Idaho 590, 592, 701 P.2d 210, 212 (1985) . . .
>
> ". . The law and the instructions required the jury to examine the case from two different points of view. It is reasonable to read the special verdicts as saying that Lederle's failure to develop the Tri-Solgen vaccine was unreasonable conduct, although the danger posed by the product itself was not greater than an ordinary consumer would reasonably expect."

Toner, 828 F2d at 513. The court's ruling followed the Idaho Supreme Court's opinion answering the court of appeals' certified questions. The Idaho court wrote:

> "Unreasonable dangerousness, as used in this context, is an element of a strict liability cause of action, not of a negligence cause of action. There is no dispute that negligence and strict liability are separate, non-mutually exclusive theories of recovery, and that '[the] failure to prove one theory does not preclude proving another theory.' Chancler v. American Hardware Mutual Insurance Co., 109 Idaho 841, 846, 712 P.2d 542, 547 (1986). As the Washington Supreme Court stated: 'Negligence and strict liability are not mutually exclusive because they differ in focus: negligence focuses upon the conduct of the manufacturer while strict liability focuses upon the product and the consumer's expectation.' Davis v. Globe Machine Manufacturing Co., Inc., 684 P.2d 692, 696 (Wash. 1984), *cited in Chancler, supra*, 109 Idaho at 846, 712 P.2d at 547."

Toner v. Lederle Laboratories, 112 Idaho 328, 334 n.5, 732 P2d 297, 303 (1987) (response to court of appeals certified questions).

The distinction between negligence and warranty liability as explained in the instructions provided a reasonable basis for reconciling the special verdicts on those theories:

> "Similarly, we do not think the jury's verdict on the negligence issue is necessarily inconsistent with its finding that Lederle did not breach the implied warranty of merchantability. On that issue, the jury was instructed that 'a breach of this warranty occurs when the product is not fit for the ordinary purposes for which the product is to be used.'

> It is not beyond peradventure that the jury thought that Tri-Immunol was fit for the purposes for which it was to be used, but that Lederle was negligent in failing to replace it with a better product. . . . In the case before us, the jury could have believed that the vaccine was not per se unfit for its intended use but that Lederle was negligent in failing to develop the alternative. The jury's verdicts rendered pursuant to the instructions as given are amenable to an interpretation that makes them consistent."

Toner, 828 F2d at 513-14.

The standard applied and the analysis employed by the Court of Appeals for the Ninth Circuit is consistent with the decisions of this Court in *Gallick v. Baltimore & Ohio R. Co.* and with other decisions of the circuit courts.

Lederle Laboratories has petitioned for a Writ of Certiorari on the ground of a supposed conflict between the decision in this case and the decisions of the Court of Appeals for the Eleventh Circuit in *Witt v. Norfe, Inc.*, 725 F2d 1277 (1984), and the Court of Appeals for the Eighth Circuit in *McIntyre v. Everest & Jennings, Inc.*, 575 F2d 155 (1977), *cert. denied*, 439 U.S. 864 (1978). This supposed conflict does not exist.

The courts of appeals in this case, in *Witt*, and in *McIntyre* actually applied the same standards and analysis.

The first decision on which Lederle relies to suggest a conflict is *Witt v. Norfe, Inc.*, 725 F2d 1277 (11th Cir. 1984). The opinion in *Witt* examines special ver-

dicts in a case involving the glass used in the shower door. The jury reached special verdicts for the plaintiff on negligence, and for the defendant on strict liability and implied warranty. The court held that the verdicts were inconsistent under Florida law.

The standard and analysis applied by the *Witt* court is remarkably similar to that employed by the court of appeals in this case. The court set out a deferential standard at the outset:

> "In order to qualify as inconsistent, however, there must be 'no rational, nonspeculative way to reconcile . . two essential jury findings.' Higginbotham v. Ford Motor Co., 540 F.2d 762, 773 (5th Cir. 1976). 'Answers should be considered inconsistent . . only if there is no way to reconcile them . . Even a jury verdict inconsistent on its face is not inconsistent if it can be explained by assuming the jury reasonably misunderstood the instructions.' Willard v. Hayward, 577 F.2d 1009, 1011 (5th Cir. 1978)."

Witt, 725 F.2d at 1278. The court then examined state substantive law and the jury instructions to ascertain the fair meaning of the special verdict. *Witt*, 725 F2d at 1278-1280.

The *Witt* court reached a different conclusion on the consistency of the verdicts because it applied fundamentally different state law. Florida requires a plaintiff to prove only that a product is defective to recover in strict liability. *Witt*, 725 F2d at 1279; *Cassisi v. Maytag Co.*, 396 So.2d 1140, 1143-1145 (Fla.App. 1981). Idaho requires that plaintiffs prove that the product is defective *and* unreasonably dan-

gerous to persons as measured by the consumer expectation test. *Toner*, 828 F2d at 513; *Toner*, 112 Idaho at 333, 732 P2d at 302; *McBride v. Ford Motor Company*, 105 Idaho 753, 673 P2d 55 (1983); *Rojas v. Lindsay Mfg. Co.*, 108 Idaho 590, 701 P2d 210 (1985). The standard for liability and strict liability played a key role in the decision in both *Witt* and in this case.

Lederle's suggestion that this case and *Witt* were decided under "virtually the same state substantive law" (Petition at pp. 15-16) is a gross misstatement. There are fundamental differences between the standard of liability under Florida and Idaho product liability laws as explained above.

The *Witt* court even explained that the negligence and strict liability verdicts would have been consistent had Florida retained the requirement of "unreasonable dangerousness" element of strict liability.

> "At first blush, it would not seem necessarily inconsistent for a jury to find a defendant negligent, yet not strictly liable in tort. The manufacturer might well have been less than reasonably careful, i.e., negligent, in designing the shower door, but for which plaintiff's injuries would not have occurred; that would not necessarily mean that the resulting design defect rose to the level of being 'unreasonably dangerous'. In Florida, however, a recent court of appeals decision indicates that the design defect need not be 'unreasonably dangerous' in order to satisfy the requirements of a strict liability claim, notwithstanding the language of *West* [*West v.*

> *Caterpillar Tractor Co.*, 336 So.2d 80 (Fla. 1976)] and § 402A."

Witt, 725 F2d at 1279 (applying Florida law) (footnote omitted).

The court of appeals' decision that the special verdicts in this case are consistent is based on similar reasoning.

> "It is reasonable to read the special verdicts as saying that Lederle's failure to develop the Tri-Solgen vaccine was unreasonable conduct, although the danger posed by the product itself was not greater than an ordinary consumer would reasonably expect."

Toner, 828 F2d at 513. Idaho substantive law defines "unreasonable dangerousness" in terms of the ordinary consumer's expectations of the dangers posed by the product. *Rojas v. Lindsay Mfg. Co.*, 108 Idaho 590, 592, 701 P2d 210, 212 (1985); Jury Instruction No. 21.

Nor does the *Witt* court's failure to reconcile the negligence and implied warranty verdicts reflect a conflict with the Ninth Circuits' decision. In our case, Idaho substantive law required the jury, and, therefore, the court, to focus on the conduct of Lederle when considering its negligence, *Toner*, 828 F2d at 513, and on the product when addressing warranty, *Toner*, 828 F2d at 513-14; Jury Instruction No. 29.

The evidence of Lederle's failure to exercise reasonable care to market a safer vaccine could establish negligent conduct without necessarily requiring a finding that the vaccine was not fit for its ordinary use. *Toner*, 828 F2d at 514.

The Idaho Supreme Court has ruled that contrary jury verdicts on negligence and warranty are not inconsistent. *Fish Breeders of Idaho, Inc. v. Rangen, Inc.*, 108 Idaho 379, 386, 700P2d 1, 8 (1985).

Again, state law explains the different results. The *Witt* opinion gives no indication of similar state law or that the plaintiffs in *Witt* presented evidence of Norfe's conduct independent of the product itself. In *Toner*, that evidence was presented.

Comparing the *Witt* decision with the decision of the court of appeals reveals a remarkably similar approach. The different results are the product of the different state laws, and neither suggests conflict nor grounds for granting a writ of certiorari. *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 206, 58 S.Ct. 860, 861 (1938).

The second decision which Lederle cites for the supposed conflict, *McIntyre v. Everest & Jennings, Inc.*, 575 F2d 155 (8th Cir., 1977), *cert. denied*, 439 U.S. 864 (1978), does not decide the question of whether the jury's special verdicts were consistent. The Court simply concludes:

> "The courts of Missouri, the forum state in this diversity action, have not decided this issue [question of the consistency of a special verdict for the plaintiff in negligence and for defendant in strict liability]. While we are required to apply state law in diversity cases, we are not bound to predict state law developments when it is not necessary to do so. Edwards v. Sears, Roebuck & Company, 512 F.2d 276, 291(5th Cir. 1975). We decline to establish a rule on this issue, but rather *we hold only that insufficient evidence exists*

> *to support a verdict in favor of the plaintiffs on the issue of negligence.*"

McIntyre, 575 F2d at 158 (emphasis supplied). A decision that does not decide a question cannot create a conflict of authority on that question.

Although not deciding the question, the preliminary analysis in *McIntyre* clearly demonstrates the similar approach employed by the circuits in reconciling verdicts. The court opens with the reference to the standard applied on the question:

> "Special answers or findings by the jury must be consistent with each other. If they are irreconcilable or inconsistent, they destroy each other. It is, however, the duty of the courts to make every reasonable effort to harmonize the answers. Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108, 119 (1963); Ludwig v. Marion Laboratories, Inc., 465 F.2d 114, 118 (8th Cir. 1972); Stockton v. Altman, 432 F.2d 946 (5th Cir.), cert. denied, 401U.S. 994 (1971)."

McIntyre, 575 F2d at 157. After stating the standard, the court examines the applicable state substantive law to determine the meaning of the special verdicts and, therefore, their consistency. *McIntyre*, 575 F2d at 157-158.

There is clearly no conflict among the circuits on the standard or analysis applied in determining the consistency of special verdicts in diversity product liability cases. Lederle's Petition is predicated on this non-existent conflict. The Petition should, therefore, be denied.

II.

THE CONSISTENCY OF SPECIAL VERDICTS IS A QUESTION OF STATE LAW IN DIVERSITY CASES; THERE IS NO FEDERAL QUESTION.

This is a diversity case in which Idaho law governs negligence, strict liability, and implied warranty liability. *Erie Railroad Co. v. Thompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938). As the meaning of and, therefore, the consistency of, special verdicts is controlled by the substantive state law on which the jury was instructed, *Toner*, 828 F2d at 513-14; *Witt*, 725 F2d at 1278-79, the Petition raises only questions of state law. The Petition should be denied because it fails to raise an issue of federal law. *Wolf v. Weinstein*, 372 U.S. 633, 637, 83 S.Ct. 969, 972, *reh. denied*, 373 U.S. 928, 83 S.Ct. 1522 (1963); *Benz v. New York State Thruway Authority*, 369 U.S. 147, 82 S.Ct. 674 (1962).

The court of appeals correctly determined the consistency of the special verdicts with reference to the jury instructions, and Idaho substantive law as clarified by the Idaho Supreme Court's response to the court of appeals certified questions, *Toner*, 828 F2d at 513-14 (citing *Toner v. Lederle Laboratories*, 112 Idaho 328, 334 n.5, 732 P2d 297, 303 n.5 (1987) (response to court of appeals certified questions)). This approach is consistent with the court's analysis in *Gallick*, 372 U.S. at 121-23, 83 S.Ct. at 666-68, and with that employed by the courts of appeals in *Witt* and *McIntyre*.

The central role of substantive state law in determining the consistency of special verdicts in diversity cases is discussed in detail *supra*, pages 11-14.

It is clear from the court of appeals' analysis that this is a question which turns on the interpretation of state law as expressed in the jury instructions.

> ". . The consistency of the jury verdicts must be considered in light of the judge's instructions to the jury. Id. at 120-21; Bates v. Jean, 745 F.2d 1146, 1151 (7th Cir. 1984).
>
> "In light of the Idaho Supreme Court's opinion and the instructions actually given to the jury, we think Lederle's paradox can be resolved and the jury's verdicts reconciled. As the Idaho Supreme Court points out, the focus in negligence is on the manufacturer's conduct, while in strict liability it is on the product and the user's expectations. Id. at 303 n.5; Rojas v. Lindsay Mfg. Co., 108 Idaho 590, 592, 701 P.2d 210, 212 (1985) . . . The instruction given to the jury on the meaning of the strict liability term 'defective condition,unreasonably dangerous' reflects this focus:
>
> "Instruction No. 21: A product is in a defective condition, unreasonably dangerous to persons if it is more dangerous than would be expected by an ordinary person who may reasonably be expected to use it. The law does not say what would be expected by an ordinary person or who may reasonably be expected to use the product. Both of these are for you to decide.'
>
> "This focus is different from the emphasis in the instruction on negligence, which is phrased in terms of the manufacturer's duty

to 'exercise ordinary and reasonable care not to expose the potential consumer to an unreasonable risk of harm.'

"The law and the instructions required the jury to examine the case from two different points of view. It is reasonable to read the special verdicts as saying that Lederle's failure to develop the Tri-Solgen vaccine was unreasonable conduct, although the danger posed by the product itself was not greater than an ordinary consumer would reasonably expect.

"Similarly, we do not think the jury's verdict on the negligence issue is necessarily inconsistent with its finding that Lederle did not breach the implied warranty of merchantability. On that issue, the jury was instructed that 'a breach of this warranty occurs when the product is not fit for the ordinary purposes for which the product is to be used.' It is not beyond peradventure that the jury thought that Tri-Immunol was fit for the purposes for which it was to be used, but that Lederle was negligent in failing to replace it with a better product. This case is distinguishable from Witt v. Norfe, 725 F.2d 1277, 1279-80 (11th Cir. 1984), in which the manufacturer of a glass shower door could not have been negligent in its production if the product were fit for its intended purpose as found by the jury. In the case before us, the jury could have believed that the vaccine was not per se unfit for its intended use but that Lederle was negligent in failing to develop

> the alternative. The jury's verdicts rendered pursuant to the instructions as given are amenable to an interpretation that makes them consistent."

Toner, 828 F2d at 512-514.

This Court should not grant certiorari to re-examine the court of appeals' analysis of Idaho product liability law.

CONCLUSION

There is no conflict among the circuits as to the standard applied in determining whether special verdicts are consistent. The courts of appeals uniformly apply this Court's mandate in *Gallick* that they find the special verdicts consistent if possible under any fair reading of the verdicts. There is no conflict among the courts of appeals as to the analysis applied in determining the fair reading of the verdicts. The courts of appeals examine the substantive state law on which the jury was instructed in order to determine the fair reading of the verdicts.

Substantive state law ultimately determines the meaning of special verdicts in diversity cases and, therefore, their consistency. The question presented in Lederle's Petition for Certiorari, the consistency of the special verdicts in this case, is a question of state, not federal, law.

As there is no conflict among the circuits, and the issue presented the Court is one of state law, the Petition should be denied.

Respectfully submitted, this 10th day of February, 1988.

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